Office - Supreme Court, U.S.
FILED
SEP 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-109 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST STICH, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek review of the decision of the court of appeals that the government's use of a "surprise" expert witness and other alleged abusive tactics during the trial of their case arising under the National Swine Flu Immunization Program of 1976 (Swine Flu Act), Pub. L. No. 94-380, 90 Stat. 1113 *et seq.*, did not affect the district court's finding that their injuries were not caused by swine flu vaccine.

1. The Swine Flu Immunization Program was initiated in 1976 as an effort by the federal government to immunize a large portion of the population of the United States in order to prevent a potential influenza epidemic. § 2, 90 Stat. 1113. Because of the risk that some people would react adversely to the vaccine, Congress did not force anyone to participate in the program; it was created as a purely voluntary program, both for those providing the vaccine and

those receiving it. 122 Cong. Rec. 20280 (1976) (remarks of Sen. Javits). To encourage drug manufacturers to supply the vaccine, Congress provided that the United States under the Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.*, would assume all of the liability of program participants that otherwise would have existed under applicable state law. § 2, 90 Stat. 1115.

Petitioner Miriam Stich[1] received a swine flu vaccination as part of the federal government's inoculation program on November 18, 1976. Nine days later she began experiencing muscle aches, a headache, fever and general malaise. Her condition deteriorated and on November 27, 1976, she was admitted to a hospital in Red Bank, New Jersey (Pet. App. A14). At that time she was unconscious and having convulsions. Petitioner's treating physician diagnosed her condition as "meningo-encephalitis of unknown etiology" (*id.* at A15). Petitioner has been transferred to several hospitals since then and with extensive therapy her condition has improved to some extent. Nevertheless, petitioner is still hospitalized; she remains disoriented and her speech is largely unintelligible (*id.* at A4).

2. Petitioners filed suit under the Swine Flu Act, § 2, 90 Stat. 1115, against the United States in the United States District Court for the District of New Jersey, alleging that petitioner had contracted Guillian-Barre Syndrome (GBS) or some other disease of the central or peripheral nervous system that was causally related to the swine flu vaccine she received in November 1976 (Pet. App. A2). Petitioners' action, along with several hundred other suits, was transferred by the Judicial Panel on Multi-District Litigation to

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[1]The other petitioner is Mrs. Stich's husband, who brought suit derivatively, claiming loss of consortium and of his wife's services (Pet. App. A11). For simplicity, "petitioner" will be used to refer to Mrs. Stich.

the United States District Court for the District of Columbia for consolidated pre-trial proceedings pursuant to 28 U.S.C. 1407. The final pre-trial order provided that if petitioner established that she had contracted GBS, liability would be conclusively presumed. If, however, a disease other than GBS were proved, petitioner would have the additional burden of establishing negligence or some other basis of liability (Pet. App. A4, A5). After the conclusion of the consolidated pre-trial proceedings, the case was transferred back to the District of New Jersey for trial.

After a bench trial, the district court entered judgment for the United States (Pet. App. A10-A64). Based on an exhaustive analysis of the diagnostic symptoms for GBS, the district court found that petitioner had failed to establish by a preponderance of the evidence that her illness was GBS or any other condition recognized as having been caused by the swine flu vaccine (*id.* at A21-A32). The court concluded instead that petitioner suffered from Herpes Simplex Encephalitis (HSE), which is a viral condition that causes an inflammation of the brain and is not caused by swine flu vaccine (*id.* at A42-A60).

The court of appeals affirmed (Pet. App. A1-A9). Petitioners raised several issues on appeal, but the court of appeals disposed of all but one without discussion (*id.* at A5 n.2). The court of appeals rejected petitioners' claim that the district court erred when it permitted Dr. Richard Whitley to testify as a "surprise" expert on behalf of the government concerning an article that he had authored just before trial on the subject of HSE and its symptoms. The court noted that the government had not deliberately concealed the article from petitioners; the expert had not finished it until shortly before he was scheduled to testify. Moreover, the court found that "[petitioners'] claim of surprise is attenuated by the fact that they had long been aware of several articles written by Dr. Whitley that relied on essentially the

same data base, but had not requested discovery of that data" (*id.* at A7 (footnote omitted)). The court of appeals also pointed out that the district court was justifiably concerned that granting petitioners a continuance to examine the article or its data would unduly delay the trial, and it observed that petitioners did little to mitigate this problem: "Although [petitioners] had had the new article for a week before Dr. Whitley was scheduled to testify, they waited until [he] was on the stand and testifying to make their discovery request" (*ibid.*).

Finally, the court of appeals concluded that "a fair reading of the district court's opinion suggests that the judge did not rely on Dr. Whitley's article or testimony in deciding that [petitioner] did not have GBS * * * [;] [i]t appears that the judge relied on the contested article and testimony only in concluding that [petitioner] had HSE—a conclusion unnecessary to the judge's decision that [petitioners] failed to carry their burden of proving that [petitioner's] illness was caused by the Swine Flu shot" (Pet. App. A8 n.6).[2]

3. Petitioners' principal contention (Pet. 16-17) is that the court of appeals erred in not finding that the district court abused its discretion in failing to sustain their objection to Dr. Whitley's expert testimony. Petitioners do not demonstrate, however, how the court of appeals erred in its application of the abuse of discretion standard to the facts of this case. Instead, they point (Pet. 16) to an alleged conflict among the circuits regarding the issue of the admissibility of "late-emerging expert testimony." Petitioners

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[2]The court of appeals also held that "[w]hile there is some force" to petitioners' argument that the district court erred in failing to grant them the right, under Rule 1006 of the Federal Rules of Evidence, to discover the underlying data summarized in "Table 4" of the article, "[petitioners] waived it by failing to raise it below in a specific and timely fashion" (Pet. App. A9).

assert (Pet. 16-17) that many other courts of appeals have reversed on the basis that late emerging testimony was introduced, but the Third Circuit allegedly has refused to hold that such expert testimony is ever erroneously admitted, and that the decision below is representative of the circuit's improper practice.

Even if petitioners' characterization of Third Circuit law were correct, and they cite no decision of that court as announcing any such blanket rule concerning expert testimony, the district court's decision was not based on a standard weighed heavily against exclusion of "late-emerging" testimony. Instead, it was "predicated on a balancing of prejudice and unfair surprise against materiality and delay in the litigation" (Pet. App. A9). The decision of the court of appeals concluded that petitioners failed to demonstrate that the district court abused its discretion in applying that balancing test to the facts of this case. Such a fact-bound holding clearly does not warrant review by this Court.

Moreover, any error committed by the district court in failing to exclude Dr. Whitley's testimony or in failing to give petitioners additional time to study Dr. Whitley's article was harmless. As the court of appeals stated, "a fair reading of the district court's opinion suggests" that the district court relied upon Dr. Whitley's testimony only in support of its conclusion that petitioner had HSE.[3] But that

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[3]After an exhaustive review of the medical evidence and without reference to the disputed expert testimony, the district court concluded that petitioner "did not exhibit the symptoms necessary to a diagnosis of GBS" (Pet. App. A8 n.6, A16-A42), acute disseminated encephalomyelitis (ADEM) or post-vaccinal encephalitis (*id.* at A60-A62). Relying heavily on the diagnostic guides set forth in Dr. Whitley's article, the district court concluded that petitioner's condition was HSE (*id.* at A49). Since petitioners failed to meet their burden of showing that petitioner's illness was GBS or any other disease associated with the swine flu vaccine, petitioners would not have prevailed even without the finding on HSE.

conclusion was unnecessary to the critical finding that petitioners' evidence was insufficient to prove that petitioner suffers from GBS or any other disease caused by the swine flu vaccine (Pet. App. A8 n.6). Accordingly, this case is an inappropriate vehicle for resolving any issues concerning the standards for admissibility of expert testimony.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1984

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[4]Petitioners also contend (Pet. 12-13) that this Court should review this case because the government's conduct at trial evidenced a breach of its duty to administer claims under the Swine Flu Act fairly. But Congress decided to use the adversary, judicial process to resolve claims based on the inoculation of swine flu vaccine; it could hardly have assumed that the government would not defend against questionable claims vigorously. Thus, the issue in swine flu vaccine cases is the same as in any case where abusive trial tactics are alleged—whether the litigant's conduct unfairly affected the ability of the trier of fact to reach a decision. Petitioners have not shown how the alleged abuses tainted the district court's ultimate finding that petitioner did not have GBS or any other disease associated with the swine flu vaccine. The court of appeals rejected petitioners' contentions in this regard as "meritless" (Pet. App. A5 n.2). That fact-bound determination, which affects only petitioners, does not warrant further review.

DOJ-1984-09